

214

No. 36/83

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

VAN CAMP, WHITE AND FITZPATRICK JJ.

IN THE MATTER OF the Ontario	)	<u>A. Lenczner, Q.C.</u>
Human Rights Code, R.S.O.	)	<u>for the Applicant</u>
1980, Chapter 340;	)	
	)	<u>J. Judge & J. Field</u>
AND IN THE MATTER OF a	)	<u>for Ontario Human Rights</u>
Complaint made by Cynthia	)	
Joseph against the College	)	<u>Ms. J.E. Minor</u>
of Nurses of Ontario.	)	<u>for Attorney General of Ontario</u>
	)	
	)	<u>Heard: February 21, 1985</u>

VAN CAMP J. (Orally):

This is an application by the College of Nurses of Ontario to prohibit a Board of Inquiry under the Ontario Human Rights Code from proceeding with the formal inquiry under the Code re a complaint of a nurse.

The background to the complaint was as follows. The hospital had terminated the employment of the nurse. As required, it reported to the College of Nurses. As required by statute, the College began an inquiry into the competency of the nurse to practice. On the evidence before us, the College conducted its inquiry in accordance with its governing statute. The nurse was afforded adjournments, was told that the expected penalty would not be more than a reprimand but the nurse prevented the completion of the inquiry by her refusal to submit to the psychiatric examination which is permitted under the Act

and was required. The nurse was temporarily suspended until she complied with that required. Instead of asking for a review by the court, the nurse made a complaint of discrimination against the employer and against the college as its "tool".

The Code requires that a complainant have reasonable grounds for believing that there has been a contravention of the Act. The Commission is to recommend whether or not a Board of Inquiry shall be appointed. There is no evidence before us other than the above to show why in this instance the recommendation was made. The decision to recommend is not reviewable. The Board of Inquiry has been appointed and this application concerns its proceedings.

Not all acts of discrimination are reviewable under the Code. The Code sets out the limits. The submissions in this application are as follows. (1) The College of Nurses cannot be guilty of contravention of the Code in the exercise of its statutory duty, in the absence of any allegation of a ground of discrimination as set out in the Code. (2) If there is no such allegation, on its face the complaint herein is not bona fide.

Under s. 5(2) of the Ontario Human Rights Code, "no self-governing profession shall exclude from membership or expel or suspend any person or member or discriminate against any person or member because of race, creed, colour, age, sex, or

marital status, ancestry or place of origin. It is conceded that the College is a self-governing profession to which this section does not pertain.

The complaint filed in April, 1981 does not allege any specific act of discrimination by the College nor does the amended complaint filed in January, 1982. Those complaints were not with respect to unfairness in the statutory investigation by the College and on their face were not a subject for inquiry under the Code. However, the particulars under the Statutory Powers and Procedures Act given in October, 1982 raised two grounds of discrimination: (1) Failure to investigate a complaint in 1979 and with respect to the hospital. No evidence has been given of any such complaint and the College had no jurisdiction to inquire into it. (2) An improper investigation by the College in view "of the complaints of disparate treatment by other non-white nurses at North York General Hospital and in view of the disproportionate number of non-white nurses being disciplined by the College of Nurses".

The complaint taken with the particulars is sufficient to allege a breach of the Code and to form the basis for the inquiry. There may be contravention by the College even while it is fulfilling its statutory duties. The Board of Inquiry has not yet made a decision. In my opinion, once a complaint has been made of a ground of discrimination that is recognized under the Code, this court should not interfere with the hearing. The

Board of Inquiry is acting within its jurisdiction in hearing a complaint of discrimination. This court may have doubts about the good faith, about the motive for bringing the complaint, but when the complaint is one that is recognized by the Code, this court should not intervene.

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FITZPATRICK J. (concurring):

The College of Nurses knows enough about what has been alleged to be able to conduct a defence of itself. I agree with Madam Justice Van Camp that a complaint can be made adequate by particulars furnished and that together they are sufficient to give the Commission jurisdiction.

Fitzpatrick

WHITE J. (dissenting):

I respectfully dissent from the majority decision of this court. The application is one for an order of prohibition to prohibit a Board of Inquiry, appointed under the Ontario Human Rights Code, R.S.O. 1980, c. 340 to inquire into a complaint laid against the College of Nurses.

In the material before us as contained in the Record are affidavits of Ms. Darlene Bateman, who is on the staff of the College of Nurses, and the affidavits have attached to them the relevant documents. At p. 10 of the Record is a letter dated 8 July 1980 from the North York General Hospital to the College advising as to the termination of employment of Miss Cynthia Joseph, a nurse. The hospital was obliged to send that letter to the College. Section 86(b) of the Health Disciplines Act, R.S.O. 1980 provides:

"Every person, other than a patient, who employees a person as a registerered nurse...

(b) shall report to the College within thirty days any termination of such employment for reasons purporting to constitute professional misconduct, incompetence or incapacity."

The material words of such letter are:

"Miss Joseph was terminated because of her refusal to report for duty on her assigned unit. This refusal resulted in her being absent from work without permission".

At p. 11 of the Record is a letter from the College to the Hospital dated 14 July 1980 acknowledging the Hospital's letter and advising that the College was required to investigate all complaints under the Health Disciplines Act and stating "In order for the College of Nurses to proceed with action on your concern it would be helpful if you would provide us with specific incidents along with substantiating documentation etc."

At p. 12 to 15 of the Record is the Hospital's letter to the College dated 8 August 1980 detailing the Hospital's complaints about Miss Joseph's nursing performance. At pp. 16-78 of the Record is what is presumably the Hospital's dossier containing documentation dealing with Miss Joseph's nursing performance and competence. That dossier was supplied to the College as requested. If one reads pp. 16 to 78 of the Record objectively, their contents in a prima facie sense raise questions pertinent to the nursing competence of Miss Joseph which questions are the legitimate concern of the College. Section 80 of the Health Disciplines Act provides for the creation of a Complaints Committee. Section 81(1) of that statute requires that the Complaints Committee "shall consider and investigate complaints".

At p. 79 of the Record is a letter dated 19 August 1980 from the College to the nurse advising her that a complaint had been received about her nursing practice, and advising that under the Health Disciplines Act, the College was required to investigate all complaints and to present findings to the Complaints Committee within 60 days of receipt of the complaint. This letter advised that the Investigations Officer would be investigating the complaint within the next few weeks and that "She would be pleased to see you and discuss the complaint explain the College of Nurses' responsibility and answer any questions you may have." This letter ends with a request that the nurse contact the Investigations Officer. The reply to this letter was a letter of Roach-Smith solicitors for the nurse dated 11 September 1980 (p. 80 Record) which is reproduced as follows:

Re: Cynthia Joseph

I represent Miss Joseph, R.N. formerly employed by North York General Hospital. Her employer discharged her for refusing to accept a transfer within the hospital. The employer has now made a complaint to the College. Regardless of the nature of the complaint it now appears that the employer is using the College as a tool of discipline and intimidation against nurses and, particularly, against Miss Joseph.

If the employer was willing to transfer Miss Joseph from 7-west to employ her in another psychiatric unit, 7-north, then how can the employer now make allegations against her competence?

This question must be answered before any steps are taken against Miss Joseph.

Reasons:

1. Evidence indicates a definite deterioration in Miss Joseph's performance, e.g.:

a) specific behaviour contrary to the plan of care for patients;

b) questionable ability to listen to team conferences in that she wrote approaches on the care plan which were the direct opposite of what had been planned;

c) calling the physician re nursing assignments;

d) comments re her evaluation;

e) refusal to keep appointments with Health Services;

f) refusal to accept a letter from the Unit Administrator regarding the Health Services appointment;

g) failure to return to work as agreed.

2. Evaluations show a fairly rapid change from "functioning very well" to "functioning adequately" and needing to return to her previous level.

3. Miss Joseph's failure to follow the plan of care or document accurately placed all patients and staff at risk.

4. Miss Joseph has an extensive record of illness and absenteeism during 1979-1980.

At p. 91 is found the letter of the College to the nurse advising of the decision of the Complaints Committee. At pp. 92 and 93 of the Record is found the letter of Roach-Smith to the College dated 3 February 1981 which I now reproduce:

Re: Cynthia Joseph

Your letter of January 9, 1981, to Miss Joseph has been referred to me for reply.

We would appreciate knowing the basis of your referral of this case to the Executive Committee. (I note that section 85(2) of the Health Disciplines Act, 1974, provides that it is the Director who may report to the Executive Committee, after appropriate inquiries have been made).

We would appreciate receiving from you particulars of any information received by you which has led you to believe that Miss Joseph may be incapacitated.

We would appreciate an opportunity to respond to or comment on any information which you may have tending to show incapacity. We believe that we should have this opportunity prior to your report to the Executive Committee and, certainly, prior to any appointment of a Board of Inquiry by the Executive Committee.

This case was initially a matter for the consideration of the Complaint's Committee. It would seem that the complaint against Miss Joseph by her former employer results from the statutory requirement of section 87(b) of the Act. We are requesting that the College postpone any further action with respect to that complaint until Miss Joseph has arbitrated the grievance which she filed against the employer as a result of her dismissal. Miss Joseph is not presently employed as a Registered Nurse and will not be so employed until her arbitration hearing is complete and until the complaint made to the College is disposed of. In the circumstances there seems to be no urgency to complete the College's usual procedure with respect to a complaint.

The fact that indicates most clearly that there is no urgency or merit to the complaint filed by the hospital is that the hospital immediately prior to Miss Joseph's dismissal had a job for her as a

psychiatric nurse. It was Miss Joseph's refusal to accept the disciplinary transfer ordered by the hospital that led to the termination of her employment. It was not her lack of competence, misconduct or incapacity that led to the termination. Miss Joseph simply refused to report for work as assigned by the employer. We believe that the hospital must be obliged to explain how, in these circumstances, it can, subsequent to the dismissal, allege incompetence or misconduct and suggest incapacity on the part of Miss Joseph. We believe that this issue should be dealt with prior to any action taken with respect to the complaint.

May I hear from you at your earliest convenience?

Yours truly,
Michael F. Smith

At pp. 94-95 of the Record is a letter dated 6 February 1981 from the College to Roach-Smith which I now reproduce:

Re: Cynthia Joseph

Your letter to Miss Macdonald of February 3rd has been referred to the writer for reply.

First of all as to the procedure by which this case has arrived at the Executive Committee we wish to point out to you Section 82(2) of the Health Disciplines Act. Under that section the Complaints Committee may refer the matter to the Executive Committee for the purposes of Section 85 (that is for inquiry into the capacity of the registrant).

This is what has been done in this case. We enclose herewith a copy of the decision of the Complaints Committee.

The Executive Committee on January 16, 1981 referred this matter to the Board of Inquiry for a report. This matter will be considered by the Board of Inquiry at their next meeting. It may well be that the Board of Inquiry will require your client to submit to an examination by a legally qualified medical practitioner pursuant to Section 85(6) before submitting the report to the Executive Committee.

There is no provision in the act or in the practice as it has developed for submissions by Council or the registrant to the Executive Committee prior to the appointment of the Board of Inquiry or the receipt of their report. The time for submitting a response was prior to the meeting of the Complaints Committee. Your client did not choose to avail herself of that opportunity.

We enclose herewith for your information two letters received from Miss C. Caron, Assistant Director of Nursing, North York General Hospital. One is dated July 8th, the other is dated August 8th, both of 1980. These two letters are the original letter of complaint against your client.

We are willing to share with you any other information which we have in our file at whatever stage you wish. If you wish to set up a convenient time to attend here and review our information we would be pleased to co-operate.

You have requested that this matter be held in abeyance pending resolution of your client's arbitration proceedings with the hospital. We can not agree to this request. The matters which are being arbitrated concern your client and her former employer and presumably their collective agreement. The matters which we are concerned with concern you client and the public interest and must be dealt with entirely independently of the other proceedings.

We look forward to hearing from you at your early convenience.

Yours sincerely,

Michael E. Thurston
Legal Counsel
College of Nurses of Ontario

At p. 96 of the Record is a letter from the College to Miss Joseph dated 13 February 1981 requesting that pursuant to s. 85(3) of the Health Disciplines Act she submit to an examination of her mental health status by a named doctor. At pp. 97 to 99 of the Record is a letter dated 20 February 1981 from Roach-Smith to the College's legal counsel which I now reproduce:

Re: Cynthia Joseph

I have received your letter of February 6, 1981, which replies to my letter to Miss Macdonald of February 3, 1981.

My client takes objection to all of the steps taken by the College resulting from the termination of her employment by the North York General Hospital. Miss Joseph was actually informed of the termination of her employment by way of a letter dated June 18, 1980. The hospital cited Miss Joseph's refusal to meet the conditions outlined to Miss Joseph by letter dated June 11, 1980, as the reason for her dismissal. The letter of June 11, 1980, had insisted that Miss Joseph report for duty on Unit 7-North on June 18th, 1980 or provide satisfactory medical certification to support her absence. In fact, on May 28, 1980, Miss Joseph had indicated to her employer that she would be prepared to return to work on May 29, 1980. However, Miss Joseph indicated that she would not work on 7-North and would not report for duty if required to work on 7-North. Miss Joseph made it very clear that she would not accept the transfer of her employment to Unit 7-North. The transfer had been

imposed by the employer and Miss Joseph was informed of it by letter dated April 24, 1980.

Miss Joseph regarded the proposed transfer as a disciplinary transfer and grieved against it. By keeping her employer fully advised of her refusal to report for duty on 7-North Miss Joseph avoided any risk to the patients or staff which might have resulted from her failure to report for duty. Some of the circumstances surrounding the termination of Miss Joseph's employment indicate that her conduct showed certain aspects of a resignation from employment: a resignation, however, which was imposed by the conduct of the employer.

Until the former termination of the employment the employer seems to have had no occasion to complain to the College concerning Miss Joseph's work. Therefore, it may be safe to assume that the employer's letter to the College dated July 8, 1980, advising the College of the termination of Miss Joseph's employment, was actually in compliance with the duty imposed upon employers by section 87 of the Health Disciplines Act, 1974. That section requires that the employer shall report to the College within 30 days any termination of employment for reasons purporting to constitute professional misconduct, incompetence or incapacity. However the letter of July 8, 1980, includes no allegations of incompetence or incapacity. The letter only indicates a refusal to report for duty which, we submit, could not be construed as professional misconduct in the circumstances.

My client therefore takes strong objection to the complaints and allegations which have subsequently been made against her. In reviewing the letter from the College to Miss Joseph, dated October 21, 1980, I note that only three items in the long list of complaints occurred within the 6 months preceeding the termination of Miss Joseph's employment. Those three items appear on page 4 and are dated March 18,

March 25 and May 29 to June 18, 1980. I submit that with respect to all other items of complaint, the College is barred from considering them by virtue of section 11 of the Public Authorities Protection Act of Ontario which sets a strict limit of 6 months for initiating proceedings against a public authority, including a nurse in Miss Joseph's position. We submit that the College should not be dealing with those allegations in anyway and we are prepared to seek court enforcement of the protection offered by the Public Authorities Protection Act.

We believe that the College has unwittingly been enlisted by the employer in its campaign against Miss Joseph. One of the most significant aspects of the dispute between Miss Joseph and the North York General Hospital concerned her refusal to submit to psychiatric assessment at the direction of the hospital. It has been Miss Joseph's steadfast position that there was absolutely no ground for the hospital's insistence that she seek medical help. As a result of Miss Joseph's refusal to submit to psychiatric examination the hospital imposed a disciplinary suspension. Miss Joseph has grieved against that suspension and the arbitration is still pending. Now, based on the allegations of that same employer the College has adopted a course of action which imposes on Miss Joseph the psychiatric examination which she had initially resisted. The College has insisted that Miss Joseph be put to her own defence to answer the allegation made by the employer. Miss Joseph declined to make that defence because the allegations are groundless and because the employer is acting in bad faith in making the allegations against Miss Joseph.

As far as we know there has been no satisfactory investigation of the allegations made by the employer but, still, the College presumes to impose upon Miss Joseph the obligation to submit to psychiatric assessment. We believe that this action is inappropriate and unnecessary at this time. We have

previously indicated to the College and undertaken to the College that Miss Joseph will not be employed as a registered nurse pending the conclusion of the arbitration hearings which will determine the dispute between Miss Joseph and her employer.

It is obvious that Miss Joseph was not terminated because of misconduct, incompetence or incapacity and, therefore, the College should have no interest in this dispute between Miss Joseph and her employer, at all.

We therefore request that the College postpone the mental and physical examination proposed for February 25, 1981, and delay all further action with respect to this matter until the arbitration process has been completed. We would like to advise you that the proposal that the examination take place on February 25, 1981 does not provide sufficient time for Miss Joseph to consider her position and make the necessary arrangements.

Yours truly,

Michael F. Smith

At p. 100 of the Record is found the letter of the College's legal counsel to Roach-Smith advising of a rescheduled appointment for the named doctor's examination of Miss Joseph. At p. 101 of the Record is found a letter of the College's legal counsel to Roach-Smith dated 9 April 1981 which I reproduce:

Re: Cynthia Joseph

Confirming our telephone conversation of Wednesday, April 1st this will confirm that we have cancelled the appointment for your client's examination by Dr. Robinson for the second time because your client has refused to attend.

We wish to advise that we will be requesting the Board of Inquiry on April 16 to suspend your client's Certificate of Competence until she has attended on an appointment at Dr. Robinson's office.

Yours very truly,

Michael E. Thurston
Legal Counsel

At p. 103 of the Record is a letter dated 8 May 1981 from Roach-Smith to the College's legal counsel which I now reproduce:

Re: Cynthia B. Joseph.

I write to advise you that we have been retained to apply for judicial review of the decisions of the College of Nurses of Ontario in:

- (1) requiring Miss Joseph to submit to an examination by a medical practitioner;
- (2) ordering that her certificate of competence be suspended.

The grounds for the proposed application are that in each case the decision making body of this self-governing profession made its decision in violation of natural justice, in that decisions were made with no hearings.

Miss Joseph was not given notice of the hearing, nor an opportunity on invitation to appear and put her side of the case.

It occurs to us that this is such a patent contravention of natural justice, that the College may want to reverse the decision without the necessity of a Divisional Court application followed by an action for damages.

If there is publication of the purported suspension, there is also the real possibility of a defamation suit being launched against the College.

We expect a reply from you without delay.

Yours truly,

Charles C. Roach

At p. 104, 105 and 106 of the Record is a letter dated 14 May 1981 from the College's legal counsel to Roach-Smith dated 14 May 1981, which I now reproduce:

Dear Sir:

Further to yours of May 8th perhaps it would be helpful to you if we were to review the history of this matter since you seem to have taken over carriage of this file from Mr. Smith.

On October 21, 1980 a letter was sent from this office to your client with a carbon copy to your office setting out the specific allegations concerning the nursing practice of your client. In that letter she was advised that the matter would be considered by the Complaints Committee on November 12th. She was invited to submit a written response.

We would point out to you Section 82 of the Health Disciplines Act. There is no requirement under that section that the Complaints Committee conduct a hearing at which viva voce evidence would be called. Indeed it is quite clear from the legislation that that is not the intent or the purpose of the Complaints Committee.

In any event at your office's request the matter was put over to the Complaints Committee meeting on December 9th and

then again at your office's request to the meeting of January 7th to allow time for a written response. At no time was there any suggestion by your office that this procedure was in any way contrary to law or unfair to your client.

Even though two adjournments had been granted at your office's request to permit a response to the allegations no response was in fact submitted on your client's behalf and the Complaints Committee considered the matter at their meeting on January 7, 1981. At that time the matter was referred to the Executive Committee for the purposes of Section 85. We enclose herewith a copy of the decision of the Complaints Committee in case you have not had an opportunity to review it.

Your client was informed of the decision of the Complaints Committee by a letter dated January 9th with a copy to your office.

Your Michael Smith wrote to us by letter dated February 3rd requesting that this matter be held in abeyance pending the outcome of an arbitration proceeding. By letter dated February 6th we replied that this could not be done and advised Mr. Smith that the Executive Committee had referred the matter to the Board of Inquiry.

The Board of Inquiry met on February 12th and directed that your client be assessed by Dr. G.E. Robinson, Psychiatrist, at the Toronto General Hospital. By letter dated February 13th your client was advised of the decision of the Board of Inquiry and an appointment had been arranged for her to be seen by Dr. Robinson on February 25th. A copy of that letter was sent to your office.

Mr. Smith then responded by letter dated February 20th in which he requested among other things that the examination by Dr. Robinson be postponed.

We complied with that request in order that both your office and your client could consider your position and take

whatever steps you deemed advisable. By letter dated March 11th Mr. Smith was advised that the appointment had been re-scheduled for April 2nd.

Your Mr. Smith contacted the writer on April 1st by telephone and advised that your client would not be attending the appointment before Dr. Robinson. The reason given in the first instance was that Dr. Robinson was a native of South Africa and therefore you were taking exception to Dr. Robinson conducting the mental examination. I am still not sure what the relevance of Dr. Robinson's place of birth is to her capacity or capabilities as a psychiatrist. However upon checking it was determined that in fact Dr. Robinson was not a native of South Africa. This was communicated to Mr. Smith on April 1st. He did not provide the writer with a reason for refusing to attend at Dr. Robinson's office but in any event advised that his client would not be in attendance.

By letter dated April 9th we advised your office that we would be requesting the Board of Inquiry at their April 16th meeting suspend your client's Certificate of Competence for failure to attend at Dr. Robinson's office.

That action was taken and a letter was sent to your client dated April 24th with a copy to your office indicating that your client's Certificate of Competence was suspended forthwith.

If you are prepared to produce your client to be examined by Dr. Robinson as required by the Board of Inquiry then upon her attendance at Dr. Robinson's office her Certificate will be reinstated. Otherwise it remains under suspension.

We trust that this outline of the history of this matter will be of some assistance to you in your decision as to what advice you will give your client and what step you will take next.

If you have any questions please do not hesitate to contact the writer.

Yours sincerely,

Michael E. Thurston
Legal Counsel
College of Nurses of Ontario

I now reproduce the relevant provisions of the Health Disciplines Act, dealing with the appointment and the functions of the Complaints Committee, and the Board of Inquiry of the College of Nurses.

80. (1) The Complaints Committee shall be composed of five persons who are members of the Council, of whom one shall be a person appointed to the Council by the Lieutenant Governor in Council.

(2) No person who is a member of the Discipline Committee shall be a member of the Complaints Committee.

81. (1) The Complaints Committee shall consider and investigate complaints made by members of the public or members of the College regarding the conduct or actions of any member of the College, but no action shall be taken by the Committee under subsection (2) unless,

- (a) a written complaint has been filed with the Director and the member whose conduct or actions are being investigated has been notified of the complaint and given at least two weeks in which to submit in writing to the Committee any explanations or representations he may wish to make concerning the matter; and
- (b) the Committee has examined or has made every reasonable effort to examine all records and other documents relating to the complaint.

(2) The Committee in accordance with the information it receives may,

- (a) direct that the matter be referred, in whole or in part, to the Discipline Committee or to the Executive Committee for the purposes of section 84; or
- (b) direct that the matter not be referred under clause (a); or
- (c) take such action as it considers appropriate in the circumstances and that is not inconsistent with this Part or the regulations or by-laws.

(3) The Committee shall give its decision in writing to the Director for the purposes of section 8 and, where the decision is made under clause (2)(b), its reasons therefor.

84. (1) In this section,

- (a) "board of inquiry" means a board of inquiry appointed by the Executive Committee under subsection (2);
- (b) "incapacitated member" means a member suffering from a physical or mental condition or disorder of a nature and extent making it desirable in the interests of the public or the member that he no longer be permitted to practise or that his practice be restricted.

(2) Where the Director receives information leading him to believe that a member may be an incapacitated member, he shall make such inquiry as he considers appropriate and report to the Executive Committee who may, upon notice to the member, appoint a board of inquiry composed of at least two members of the College and one member of the Council appointed thereto by the Lieutenant Governor in Council who shall inquire into the matter.

(3) The board of inquiry shall make such inquiries as it considers appropriate and may require the member to submit to physical or mental examination by such qualified person as the board designates and if the member refuses or fails to submit to such examination the board may order that his certificate be suspended until he complies.

(4) The board of inquiry shall report its findings to the Executive Committee and deliver a copy thereof and a copy of any medical report obtained under subsection (3) to the member about whom the report is made and if, in the opinion of the Executive Committee, the evidence so warrants, the Executive Committee shall refer the matter to the Registration Committee to hold a hearing and may suspend the member's certificate until the determination of the question of his capacity becomes final.

(5) The board of inquiry, the person whose capacity is being investigated and any other person specified by the Registration Committee are parties to a proceeding under this section.

(6) A legally qualified medical practitioner is not compellable to produce at the hearing his case histories, notes or any other records constituting medical evidence but, when required to give evidence, shall prepare a report containing the medical facts, findings, conclusions and treatment and such report shall be signed by him and served upon the other parties to the proceeding,

(a) where the evidence is required by the College, at least five days before the hearing commences; and

(b) where the evidence is required by the person about whom the report is made, at least five days before its introduction as evidence,

and the report is receivable in evidence without proof of its making or of the signature of the legally qualified medical practitioner making the report

but a party who is not tendering the report as evidence has the right to summon and cross-examine the medical practitioner on the contents of the report.

(7) The Registration Committee shall, after the hearing,

(a) make a finding as to whether or not the member is an incapacitated member; and

(b) where the member is found to be an incapacitated member, by order,

(i) revoke his certificate,

(ii) suspend his certificate for such period as the Committee considers appropriate, or

(iii) attach such terms and conditions to the certificate as the Committee considers appropriate.

It is noted that in the correspondence from Roach-Smith to the College and the College's legal counsel there is a complete absence of any complaint of racial discrimination against the nurse on the part of the College. It is further noted that in the correspondence from the College and the College's legal counsel to the nurse and her solicitors Roach-Smith there is every indication that the College is acting as required by the Health Disciplines Act in the orderly processing of a complaint as to a nurse's competence -- that proper notice of the complaint was given to the nurse and that she refused to participate in the proceedings of

the Complaints Committee. There is further evidence in the dossier supplied by the Hospital to the College upon which the Complaints Committee had cause under s. 82(2)(a) to refer the matter to the Executive Committee for the purposes of s. 85, and to order that the matter be referred back to the Complaints Committee for administration of an oral caution if the nurse was found to be not incapacitated. There is further evidence that the Board of Inquiry was proceeding properly under s. 84(3) when it required the nurse to submit to an examination as to her mental status by a named doctor and that the nurse refused to submit to such an examination. Thus the College's suspension of the nurse's certificate appears on the facts reflected in the Record, to comply with the provision found in s. 84(3) "if the member refuses or fails to submit to such examination the board may order that his certificate be suspended until he complies".

The initial complaint dated 30 April 1981 made by Miss Joseph against the College of Nurses under the Ontario Human Rights Code is found at pp. 107 and 108 of the Record and is reproduced as follows:

COMPLAINT NO. W-7331

Code Provision No. 5

COMPLAINT OF DISCRIMINATION
Under the Ontario Human Rights Code

NAME & ADDRESS OF COMPLAINANT

Cynthia Joseph
292 Finch Avenue West,
Apt. 106,
WILLOWDALE, Ontario
M2R 1M1

NAME & ADDRESS OF INDIVIDUAL/ORGANIZATION
COMPLAINED AGAINST

North York General Hospital
4001 Leslie Street
WILLOWDALE, Ontario M2K 1E1,
AGAINST their servants and agent,
College of Nurses of Ontario,
600 Eglinton Avenue East,
Toronto, Ontario. M4P 1P4.

The Complainant alleges that on,

or about the 16 April 1981

IN RESPECT OF Self

PARTICULARS OF DISCRIMINATION

I was employed as a Registered Nurse on February 18, 1975 by the North York General Hospital where I performed my duties satisfactorily and made no major errors, or more minor errors than anyone else in my department which was Psychiatry.

A campaign of harassment which was racially motivated and investigated by my Unit Administrator created untenable working conditions and eventually forced me to make a complaint to the Ontario Human Rights Commission when the Administration of the hospital took no remedial action. When it got to the point that I was ordered for no reasons to report to the Health Services for a physical and psychiatric examination, I filed a complaint of racial discrimination with the Commission on October 1, 1979.

I was subjected to several disciplinary actions, the last of which was a transfer to a floor where I was black listed before my arrival. I indicated to the hospital that I was prepared to work

elsewhere in the hospital but would not report to the floor to which I was being sent. I was subsequently notified that I was fired for failing to accept this transfer. At no time was any allegation made as to my emotional or physical unfitness for work.

Subsequent to this, I was, I believe at the instigation of the hospital accused of "a failure to meet the standards of nursing practice", a charge which the College of Nurses must investigate.

Although it has been made clear to the College that my transfer, which is seen as a disciplinary act and which is the subject of a grievance currently going through the arbitration process, the College acted as a tool of the hospital and proceeded with an investigation of this charge shortly after becoming aware of my complaint to the Ontario Human Rights Commission.

Instead of awaiting the outcome of the arbitration of my grievance and my complaint of discrimination, the College, at the hospital's bidding has seen fit to victimize me by suspending my licence although they were aware that I was not working as a R.N.

This information was forwarded to me by letter dated April 24, 1981. Prior to taking this decision, like the hospital, the College tried to insist that I go for a physical and psychiatric examination.

I believe that the above cited persons have violated Section 5(a)(b)(c)(d) of the Ontario Human Rights Code, Revised Statutes of Ontario, 1970, Chapter 118, as amended on the grounds of Section 5(e) (f) (g) (h) of the same Code.

I read this initial complaint as complaining as to the College about the following points.

1. That the College processed a complaint (respecting the nurse's competence).
2. That it proceeded with the investigation of the complaint after becoming aware that the nurse had complained to the Human Rights Commission against the Hospital.
3. That the College did not await the outcome of the grievance arbitration of her union before it went ahead in performing its complaint investigation function.
4. That the College was a "tool of the hospital."

The amended complaint; against the College, dated January 25, 1982 is found at pp. 113 and 114 of the Record and reads as follows:

Complaint No. W-7331
Code Provision No. 4(1)
(b)(c)(d)(g), 5 (2), 6

COMPLAINT OF DISCRIMINATION
Under the Ontario Human Rights Code
NAME & ADDRESS OF COMPLAINANT

Cynthia Joseph
292 Finch Avenue West
Apt. 106
WILLOWDALE, Ontario
M2R 1M1

NAME & ADDRESS OF INDIVIDUAL/ORGANIZATION
COMPLAINED AGAINST

AGAINST North York General Hospital
4001 Leslie Street
WILLOWDALE, Ontario M2K 1E1
their servants and agent
College of Nurses of Ontario,
600 Eglinton Avenue East

TORONTO, Ontario M4P 1P4

The complainant alleges that on,
or about the 16 April 1981

IN RESPECT OF SELF

CONTRAVENTION REASON

RACE COLOUR NATIONALITY ANCESTRY
PLACE OF ORIGIN

PARTICULARS OF DISCRIMINATION

I was employed as a Registered Nurse on February 18, 1975 by the North York General Hospital wher I performed my duties satisfactorily and made no major errors, or more minor errors than anyone else in my department which was Psychiatry.

A campaign of harassment which was racially motivated and instigated by my Unit Administrator created untenable working conditions and eventually forced me to make a complaint to the Ontario Human Rights Commission when the Administration of the hospital took no remedial action. When it got to the point that I was ordered for no valid reasons to report to the Health Services for a physical and psychiatric examination, I filed a complaint of racial discrimination with the Commission on October 1, 1979.

I was subjected to several disciplinary actions more severe than for others on the floor, the last of which was a transfer to a floor where I was black listed before my arrival. I indicated to the hospital that I was prepared to work elsewhere in the hospital but would not report to the floor to which I was being sent. I was subsequently notified that I was fired for failing to accept this transfer. At no time was any valid allegation made as to my emotional and physical unfitness for work.

Subsequent to this, I was, I believe at the instigation of the hospital, accused of "a failure to meet the standards of nursing practices", a charge which the College of Nurses must investigate.

Both the hospital and College have, without valid reasons, criticized the care and treatment which I gave to various patients from 1978 to 1980. I have been deprived of access to records of these patients, which I believe will show that I maintained a proper and reasonable standard of care and performance throughout.

Although it has been made clear to the College that my transfer, is seen as a disciplinary act and is the subject of a grievance currently going through the arbitration process, the College acted as a tool of the hospital and proceeded with an investigation of this charge shortly after becoming aware of my complaint to the Ontario Human Rights Commission.

Instead of awaiting the outcome of the arbitration of my grievance and my complaint of discrimination, the College, at the hospital's bidding has seen fit to victimize me by suspending my licence although they were aware that I was not working as a R.N.

This information was forwarded to me by letter dated April 24, 1981. Prior to taking this decision, like the hospital, the College tried to insist that I go for a physical and psychiatric examination.

I believe that the above cited persons have violated section 4(1)(b)(c)(d)(g), section 5(2) and section 6(a)(b)(c)(d) on the grounds of section 6(e)(f)(g)(h) of the Ontario Human Rights Code, Revised Statutes of Ontario, 1980, Chapter 340.

I read the above complaint as reiterating that the College acted as "a tool of the hospital" and that it proceeded to perform its complaint investigation process without awaiting for the outcome of human rights proceedings and union grievance proceedings against the hospital. In other words the essence of the complaint of alleged racial discrimination made by the nurse against the College is that it did not cease the complaint investigation function committed to it by the legislature of Ontario in s. 84, 85 and 86 of the Health Disciplines Act but went ahead with its investigation of the complaint in the face of a concurrent grievance procedure brought by the union, and a concurrent human rights procedure brought by the nurse against the hospital; and I regard the complaint of the College being "a tool of the hospital" as being no more than an allegation that the College when a complaint was received went about its statutory duty.

What is significant in both the initial complaint and the amended complaint against the College, of a violation of the Ontario Human Rights Code is the absence of any allegation of concert, with the Hospital, or irregular conduct on the part of the College whereby it would be deemed to be acting any differently to Nurse Joseph than to any other nurse, who comes within its procedural scrutiny, once a complaint is received under the provisions of the Health Disciplines Act. I do not read the initial or amended complaint as referring to a breach of any relevant section of the Ontario Human Rights Code.

Section 5(2) and s. 6 of the Ontario Human Rights Code are the relevant sections and they read as follows:

5. (2) No self-governing profession shall exclude from membership or expel or suspend any person or member or discriminate against any person or member because of race, creed, colour, age, sex, marital status, ancestry or place of origin.

6. No person shall,

(a) refuse to employ or to continue to employ any person;

(b) threaten to dismiss or threaten to penalize in any other way any person in regard to his employment or any term or condition thereof;

(c) discriminate against any person in regard to his employment or any term or condition thereof; or

(d) intimidate or coerce or impose any pecuniary or other penalty upon any person,

on the ground that such person,

(e) has made or may make a complaint under this Act;

(f) has made or may make a disclosure concerning the matter complained of;

(g) has testified or may testify in a proceeding under this Act; or

(h) has participated or may participate in any other way in a proceeding under this Act.

The Record further reflects (subsequent to the amended complaint) a letter from the solicitor of the College to the Ontario Human Rights Commission at p. 115 and at p. 116 a letter dated 11 February 1982 from the Ontario Human Rights Commission to the College advising that Professor Hunter had been appointed to hear and decide "the complaint". I infer that "the complaint" referred to is the initial complaint as modified by the amended complaint. I agree with Madam Justice Van Camp that "the complaint" does not allege a violation by the College of any human right of Miss Joseph under the Ontario Human Rights Code.

Even though "the complaint" alleges no breach of the Code cognizable by law, pursuant to s. 17 of the Code, the Commission under the Code recommended to the Minister that a board of inquiry be appointed and the Minister according to the letter from the Ontario Human Rights Commission to the College (pp. 115 and 116 Record) appointed Professor Hunter to hear and decide "the complaint".

The next development was the receipt by the College on 19 November 1982 of a document dated October 1982 which I reproduce in full:

COMPLAINTS MADE BY MISS CYNTHIA JOSEPH OF
WILLOWDALE, ONTARIO, ALLEGING
DISCRIMINATION IN EMPLOYMENT BY THE NORTH
YORK GENERAL HOSPITAL, 4001 LESLIE
STREET, WILLOWDALE, ONTARIO, AND BY THE
COLLEGE OF NURSES OF ONTARIO, 600
EGLINTON AVENUE EAST, TORONTO, ONTARIO.

PARTICULARS OF THE ALLEGATIONS OF
DISCRIMINATION BY CYNTHIA JOSEPH AGAINST
THE COLLEGE OF NURSES, RELIED UPON BY THE
ONTARIO HUMAN RIGHTS COMMISSION AND
CYNTHIA JOSEPH

(1) In October 1979 after Cynthia Joseph had advised the College in writing and by telephone of the problems created for her by North York General Hospital, the College failed to investigate the complaints made by Cynthia Joseph.

(2) Upon receipt of a complaint from the North York General Hospital about Cynthia Joseph, the College failed to conduct a proper investigation of the nursing standards and procedures followed by Cynthia Joseph and those followed by white nurses on her floor, particularly in view of the complaints of disparate treatment by other non-white nurses at North York General Hospital and in view of the disproportionate number of non-white nurses being disciplined by the College of Nurses.

(3) While an Ontario Human Rights Complaint by Cynthia Joseph against North York General Hospital was pending, the College acted in an arbitrary manner in ordering that Cynthia Joseph undergo a psychiatric examination and not also ordering that Gail Ouellette also undergo such an examination.

(4) The College acted in an arbitrary manner in failing to investigate the bona fides of North York General Hospital and filing a complaint about the ability of Cynthia Joseph to practice, purportedly based on incidents that were considered satisfactory at the time of their occurrence and after the hospital was prepared to continue to employ Cynthia Joseph and transfer her to another unit after such incidents and then terminated her only when she refused to consent to the transfer. The initial complaint by North York General Hospital to the College regarding Ms. Joseph's termination ought not to have been acted upon since there was then no issue of Cynthia Joseph's competence, the Hospital

being prepared to employ her but for the disagreement on the transfer to another unit.

(5) The College failed to conduct a full and fair investigation of the Complaint when it knew that Cynthia Joseph had filed a Complaint against the Hospital with the Ontario Human Rights Commission and also when it knew that one Mrs. Evans, the former Nursing Director of North York General Hospital was then employed by the College of Nurses and a member of various committees of the College. The College improperly acted on information received from Mrs. Evans regarding the conduct of Cynthia Joseph.

(6) The college had an undertaking from Cynthia Joseph that she would refrain from working as a registered nurse until the dispute with North York General Hospital and the Complaint to the College were settled. Therefore, the College should not have required the psychiatric examination which they knew or ought to have known would have the effect of undermining Cynthia Joseph's case with North York General Hospital then under arbitration.

DELIVERED this day of October, 1982.

I shall refer to the above document as the particulars of the complaint. The following are my comments on the particulars making reference to them by paragraph.

Paragraph 1, is not particulars of any complaint that went before the Minister. That complaint had to do with the College proceeding with its investigation of the complaint made by the hospital notwithstanding the concurrent Human Rights Code

proceedings against the hospital and union grievance proceedings against the hospital, and its alleged being "a tool of the hospital".

Paragraph 2, is really an allegation criticizing the way in which the College of Nurses went about conducting an investigation under its governing statute about a nurse's competence.

Paragraph 3, alleges that while the Ontario Human Rights complaint was pending the College acted in an arbitrary manner in ordering that the nurse undergo a psychiatric examination "and not ordering that Gail Ouellette also undergo such an examination". (One queries, in parenthesis, as to just how the College could order Gail Ouellette to do anything when there is no indication that there was ever a statutory complaint about Nurse Ouellette's competence before the College). Paragraph 3, is again an allegation criticizing the College's method of investigating the complaint made by the hospital as to the nurse's competence, as are paragraphs 4 and 5.

Paragraph 6, is really a complaint about the College carrying out a recommendation of a Board of Inquiry under the Health Disciplines Act, and as I read s. 8, of that Act, the College was obliged to carry out the Board of Inquiry's recommendation.

Essentially, the particulars allege that the College failed to investigate the complaints of Cynthia Joseph, failed to conduct a proper investigation of nursing standards and while the Ontario Human Rights complaint was pending, it ordered her to undergo a psychiatric examination. These are not particulars of the complaint.

I am of the view that these particulars criticize the manner in which the College was performing its statutory duty of investigating the competence of a nurse; and with respect, that is a matter for the internal, specialized discretion of the College of Nurses and not the Ontario Human Rights Commission. See Service Employees International Union Local No. 333 and Nipawin District Staff Nurses Association et al., [1975] 1 S.C.R. 382. I do not regard the alleged particulars as being bona fide particulars.

It would only be if we found that the complaint (initial complaint and amended complaint) as augmented by the particulars did not allege a violation by the College of the nurse's human rights under either s. 5(2) or 6(a) to (h)a of the Code, that we could interfere on the basis that the Board of Inquiry under the Code had no jurisdiction to proceed. The following provisions of the Ontario Human Rights Code are relevant:

15. (1) Any person who has reasonable grounds for believing that any person has contravened a provision of this Act may file with the Commission a complaint...

16. (1) Where a complaint has been filed...the Commission...shall inquire into the complaint...

17.(1) Where it appears to the Commission that a complaint will not be settled, the Commission shall make a recommendation to the Minister as to whether or not a board of inquiry should be appointed, and the Minister may, in his discretion, appoint a board of inquiry consisting of one or more persons to hear and decide the complaint.

18. The parties to a proceeding before a board of inquiry with respect to any complaint are, ...

19. The board, after hearing a complaint,

(a) shall decide whether or not any party has contravened this Act; and

(b) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor. (emphasis mine)

I am of the respectful view that the fundamental jurisdiction of the Board of Inquiry, is dependent upon there being before it a proper complaint specifying with reasonable clarity to the person charged, in what manner he, she or it has abused the human rights of the complainant. The Code, is a "fundamental law" to use the words of Lamer J. in Insurance Corp. of B.C. v. Heerspink, [1982] 2 S.C.R. at p. 158, referring to the British Columbia Human Rights Code, a statute of similar purport to the Ontario Code. Thus, pains should be taken to bring home to the College the manner in which it has committed a breach of "fundamental law". The more

pervasive the obligation in our society that human rights be respected -- (and the obligation is all pervasive if the Code sets forth a "fundamental law") -- the greater the reason for reasonable certainty of allegation of breach of that Code.

I construe the words of "the complaint" (initial complaint, amended complaint and particulars) in the light of the context of facts, that antecedes them. Such a use of facts as context to construe words is not the determining of a question of fact on the issue before the Board of Inquiry, of the type not considered to be a question of law in Insurance Corp. of B.C. v. Heerspink (supra). The proper construction to be put on the words in a document is a question of law.

A careful reading of the documents in the Record makes it clear that it was not until April 1981 that any allegation of racial discrimination was raised against the College. The initial complaint and amended complaint, allege no violation of the Code. Miss Joseph obviously laid a complaint of discrimination against the hospital and not the College in the first instance in respect of her termination from employment. There was ample opportunity for her to have alleged racial discrimination in response to the inquiries of the College. She failed through her solicitors in correspondence with the College to mention racial discrimination and in one of her solicitors' letters to the College reference is made to the Public Authorities Protection Act with a view to persuading the College to stay its investigatory process. One can

presume that her solicitors conceivably thought well upon the various ways in which the College's procedure could be at least temporarily arrested; but an allegation of racial discrimination was not one of them, insofar as that comprehensive correspondence is reflective of the nurse's position to the College.

The message conveyed to the College in her solicitors correspondence was that the College should defer its investigation until the union grievance arbitration was over. That is its essential thrust. There is a complete absence of any allegation of concerted action or collusion between the College and the hospital in the correspondence.

There is also a presumption of fact - in which the words of "the complaint" must be construed. That presumption is contained in the maxim omnia praesumuntur legitime facta donec probetur in contrarium, Coke on Littleton, p. 1283 Jowitt's Dictionary of English Law (2nd ed.) "All things are presumed to have been legitimately done, until the contrary is proved. Where there is question of official acts there is a rebuttable presumption that all necessary conditions, precedents and formalities have been complied with". Seeking to apply that maxim to the antecedent facts, the Record before us shows that the College was proceeding within the letter of its statute crossing every t and dotting every i, laid out in the various sections of its Act in dealing

with the complaint as to the nurse's competence. Surely doing so cannot possibly be considered legitimately as discrimination.

There is a further principle that applies in assessing the context of antecedent facts and that is the principle of estoppel. If a person is carrying on through the medium of solicitors in correspondence with the College, and if the situation is such that if a complaint were to be made about the College engaging in racial discrimination, it would be appropriate in that course of that correspondence, to raise it, and it is not raised, then respectfully the principle of estoppel gives rise to a form of inference, negating the bona fide existence of such racial discrimination. The estoppel is not asserted for the purpose of barring the complaint, as a matter of law, but merely as part of the context, in which we have to read the words used in the complaint.

Another part of the context of facts, in which the words of the complaint should be construed, is the duty of this court to supervise the College in the conduct of its disciplinary procedure against its members. If there was any impropriety of conduct on the part of the College, demonstrating bias, so as to single out Nurse Joseph for particular treatment under its disciplinary process by virtue of her race, that very discrimination, would be the basis for this court interfering with the College under the court's supervisory jurisdiction. Yet no application to this

court to protect Miss Joseph from the College's alleged discrimination against her based on race, has been made. If the College were in any way in collusion with the hospital so to permit its disciplinary process to be invoked in aid of racial discrimination, that process would be vitiated; and it is reasonable to infer that no such evidence exists; and furthermore it is reasonable to infer that knowledge of the supervisory jurisdiction of this court in respect of the College's procedure would be known to all.

When, in the context of antecedent facts you apprehend the substance of what is complained of, looking not merely at the words, in their superficial sense but at what the words mean, the words of "the complaint" simply mean (1) because the College did not stay its process when union grievance procedure against the hospital was afoot, (2) because it did not stay its process when a human rights procedure against the hospital was afoot, (3) because it carried out its statute imposed procedure in investigating a complaint and (4) because it was "a tool of the hospital", in carrying out that procedure, which if it means anything means merely that it was responding to the hospital's complaint as to the nurse's competence, that it was racially discriminative of Miss Joseph. I submit that none of these items singly or en masse amounts to a complaint under the Code. Therefore there is no complaint before the Board of Inquiry on which it can proceed against the College; nor was there a complaint before the

Minister, which he could refer to a board of inquiry. In Bell v. Ontario Human Rights Commission and McKay, [1971] S.C.R. 756, Mr. Justice Martland quotes Lord Goddard at p. 107:

"I think it would be impossible and not at all desirable to lay down any definite rule as to when a person is to go to the tribunal or come here for prohibition where the objection is that the tribunal has no jurisdiction. Where one gets a perfectly simple, short and neat question of law as we have in the present case, it seems to me that it is quite convenient, and certainly within the power of the applicants, to come here for prohibition.

Re CIP Paper Products Ltd. and Saskatchewan Human Rights Commission (1978), 87 D.L.R. (3d) 609, illustrates how important it is that a supervisory court not become involved in the facts before the board of inquiry. I have used the facts, as contained in the Record, only for the purpose of assisting me to examine the documents of complaint, and I have used those facts, as extrinsic aids in construing the words of the complaint. I acknowledge the validity of the principle asserted by the Saskatchewan Court of Appeal in the above case. I ask myself the question. Do the initial complaint and the amended complaint and the particulars allege a complaint that the College contravened the Code, in the factual context in which the words in those documents exist? and I answer that question no!

On the right to grant certiorari and prohibition, I quote the words of Lord Atkin uttered in 1924, noted in R. v. Electricity Commissioners, ex p. London Electricity Joint Committee Co. (1920) Ltd., [1924] 1 K.B. 171, at 205:

Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

In a nutshell "the complaint" merely alleges that the College was performing its statutory duty and did not sidetrack the performance of that duty to defer to concurrent proceedings in which it had no status; and that in performing that duty it went about it in the wrong way. I cannot accept "the complaint" therefore as valid in law. Apart altogether from the technical issue of the jurisdiction of the board of inquiry under the Code, and dealing with the intrinsic merits of this application, the Record before this court, from which I have generously quoted, puts the badge of regularity in statutory compliance with each and every move made by the College; and having regard particularly to the correspondence from the nurse's solicitors, the bringing of the College of Nurses before the Ontario Human Rights Commission has the badge of a vexatious invocation of the process of that Commission.

I would grant the application and I would issue an order to prohibit further proceedings against the College on the basis of the complaint.

Jan H. M. White

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

VAN CAMP, WHITE AND FITZPATRICK JJ.

IN THE MATTER OF the Ontario Human
Rights Code, R.S.O. 1980, Chapter 340;

AND IN THE MATTER OF a Complaint made
by Cynthia Joseph against the College
of Nurses of Ontario.

ORAL JUDGMENT

VAN CAMP J.

RELEASED: APR 04 1985